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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 386

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. McGUINESS, LOUIS H. MEYERS, FRANK PARELLA, ROCCO PARELLA, ALFRED PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STASI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON,

Petitioners,

—against—

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Respondents.

BRIEF OF RESPONDENT NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY.

SAMUEL DUKER,
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THE COURT PRESS, N. Y. C.

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Respondents.

BRIEF OF RESPONDENT NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY.

Statement.

Respondent Newspaper and Mail Deliverers' Union of New York and Vicinity submits this brief in opposition to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

POINT I.

No federal question is involved on this appeal which merits review.

Petitioners' argument is reducible to the following elements:

A. In the court of first instance petitioners sued to enforce a common law right to fair representation by their collective bargaining agent.

1. Such a right of fair representation is well recognized by the Courts.

B. The appellate Courts in reversing the trial Court in effect abolished this common law right by holding that petitioners must seek redress under the Labor Management Relations Act, 1947.

1. Such a ruling is unconstitutional since the statute in question affords no remedy to petitioners.

C. A labor union which is the collective bargaining agent of all of its employees should not be permitted to bar some employees from membership.

Examination of the record and relevant law shows the petitioners' contentions untenable.

I.

Petitioners did not sue to enforce a common law obligation of a collective bargaining agent. The entire complaint is founded on an alleged violation of a statutory duty, imposed either by the New York State Labor Relations Act (N. Y. Labor Law, Secs. 705

et seq.) or the Labor Management Relations Act, 1947 (61 Stat. 136).

Paragraph "Fourth" alleges that the respondent Union "was the representative designated or selected for the purpose of collective bargaining by the majority of the employees . . . and, as such, was the exclusive representative of all the employees. . . ." This refers to a purely statutory concept.

". . . the defendant Union, as such collective bargaining representative" then entered into an agreement with the employer (Paragraph "Fifth")—again statutory language.

"Although, under the laws of the State of New York and of the United States, defendant Union was the exclusive representative of all the employees of defendant Corporation, defendant Union did not fairly represent certain of its employees, including these plaintiffs, in negotiating and entering into the contract referred to in paragraph 'Fifth' above" (Paragraph "Fourteenth").

"Fifteenth: That the defendant Union breached its obligation as exclusive collective bargaining agent of all of the employees of defendant Corporation (including these plaintiffs) by providing in said agreement that the employer would employ only members of the Union 30 days following the effective date of the aforesaid agreement, and by offering to furnish at all times, as many men as might be required by defendant Corporation, although defendant Union then and at all times to the present day has arbitrarily and unlawfully excluded plaintiffs . . . from membership in said Union."

"Nineteenth: By reason of the failure of defendant Union to bargain fairly on behalf of all the employees of defendant Corporation, and by reason of the arbitrary and unlawful exclusion of plaintiffs from membership in defendant Union and by reason of the threat of defendant Union to cause the discharge of . . . the plaintiffs, the plaintiffs are threatened with irreparable damage, including the deprivation of their civil rights guaranteed to them under the laws and Constitution of the State of New York and the United States."

One must conclude from the complaint that a violation of a statute—in contrast to a common law right—is involved. True enough, the pleading is somewhat coy about identifying the statute and uncertain as to whether it is a state or federal statute which is violated. But clearly, the pleading shows that some statute is being violated.

Petitioners' vagueness in the pleading may have been motivated by a consciousness that to name the statute violated would consign them to the statutory remedy. In any event, the appellate Courts did not share this reluctance to name the statute and to draw the necessary conclusion that the remedy as well as the wrong were statutory.

II.

Assuming, *arguendo*, that the pleading was founded on a breach of a common law obligation, then what is the obligation violated?

Petitioners, in the Court of Appeals, argued that it is a breach of a common law fiduciary obligation of

an agent to his principal. They there cited cases which hold the obligation of an agent to his principal to be one of a fiduciary character. In their present argument they do not as precisely define the obligation of the collective bargaining representative, but the entire notion, which they deem embodied by *Clark* v. *Curtis,* 297 N. Y. 1014, is one of a common law obligation.

The state and federal labor relations acts both speak of a union as a representative for purposes of collective bargaining. The use of the term "agent" is non-statutory, but frequent. Seizing on the word "agent" in the phrase "collective bargaining agent" they seek to clothe this term with all the attributes of common law agency. But a collective bargaining agent is no more a common law agent than a catalytic agent is one. The law is clear that a collective bargaining agent is a statutory concept and creature.

The issue was clearly posed in the case of *National Maritime Union* v. *Herzog,* 78 Fed. Supp. 146 (1948), affd. 68 S. Ct. 1529, 334 U. S. 854, wherein the Union complained of a deprivation of its right to be chosen as collective bargaining agent by reason of its failure to comply with the filing provisions of the National Labor Relations Act, as amended. Said the Court at page 155:

> "Quite apart from any statutory provision, employees have always had the right to organize trade unions, and through them to bargain collectively with employers concerning wages, hours, working conditions or any other appropriate subject. It is further true that a single employee has always had the right to bargain with his employer. . . .
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> • • • •

". . . It (Congress) added to the fundamental right of employees to organize and to bargain with their employers, certain important privileges and benefits which had not existed heretofore. Not only was the right to organize unions and to bargain through them affirmed; but also the privilege of becoming the exclusive bargaining agent of all employees in a bargaining unit was extended to a labor organization favored by a majority of such employees. Moreover, employers were required to bargain collectively with the representative chosen by the majority vote. This, to be sure, was an abridgment of the minority's fundamental rights, as well as those of employers. But the importance of the broad public purpose sought to be served justified the means employed.

"Important in the consideration of the present case is the fact that, apart from the National Labor Relations Act, no union has the right to be exclusive bargaining agent. That extraordinary privilege is extended by statute and except for the Act, employers are not under compulsion to bargain collectively."

That the exclusive bargaining agent owes obligations to the workers in the collective bargaining unit was made clear by the Courts even under the Wagner Act prior to its amendment. Thus in *Wallace Corporation* v. *National Labor Relations Board,* 323 U. S. 248, this Court made it clear that the exclusive collective bargaining agent was "charged with the responsibility of representing their interests, fairly and impartially". This means that all men should have equal working rights within reasonable limitations such as seniority, etc. In other words, the members

of the Union should have no greater rights than non-members of equal skill or experience. It does not mean that every person in the bargaining unit must be pleased with everything the Union does.

Furthermore, analysis of this "common law agent" theory shows its untenability on other grounds. Since a union is the collective bargaining agent even of such persons as may have voted against it in an election, how did these minority workers make the Union their "common law agent"? Not by any of the known methods of creating the agency relationship.

As a matter of fact, the entire theory of agency is contrary to this view. Quite properly, long before the passing of our present-day labor acts, Mechem, in his work on Agency, ruled out such relationships from consideration in his treatise. Said he:

> "Authority created by law, independently of the act of the parties, in the few cases in which that may exist, is not a matter here to be considered. As has been already suggested, there are a few cases in which authority, or, more properly speaking, power, is conferred by law in certain cases. Thus an unpaid vendor of goods has a power of sale of the goods under certain circumstances. A pledgee has a power of sale. . . . A married woman, whose husband does not supply her, has, as has been already seen, a limited power to buy necessaries upon her husband's credit, which prevails notwithstanding his dissent. . . . None of these cases . . . is a question of agency at all. . . ."

1 Mechem: The Law of Agency, §203.

Applying petitioners' view of the concept that the Union owed all of the workers a common law agent's duty of highest fidelity to the industrial situation, we can arrive at some very interesting results. Should not the most recent of workers in the industry say that the Union breached its common law duty to them by making employment opportunities dependent on seniority? Should not extras object to the employment priority of substitutes and regular situation holders? Should not a worker who thinks he is worth more than than the wage scale set forth in the contract, have a cause of action against the Union for agreeing to a too modest wage scale?

The answer to these questions is obvious. A collective bargaining agent is not a common law agent of all of the employees in the unit. It can make good contracts and it can make bad contracts. With respect to non-members of the Union it owes but one obligation—to give them equal benefits under the contract with Union members. And if the workers in a bargaining unit do not like their collective bargaining agent they may seek to oust it by decertification under the Act.

Finally, it must be observed that the case of *Clark* v. *Curtis*, *supra*, never established this claimed common law right of fair representation. Since the Court of Appeals affirmed the Appellate Division without opinion, it is the holding in the Appellate Division (273 App. Div. 797) that concerns and we find the Court there stating:

> "In this action to compel the defendant union, *inter alia*, to accept plaintiffs as members or for an injunction to restrain the enforcement of a

closed shop agreement, order granting defendants' motions to dismiss the complaint on the ground that it fails to state facts sufficient to constitute a cause of action, reversed on the law, with $10 costs and disbursements, and the motions denied, with $10 costs, with leave to defendants to answer within ten days from the entry of the order hereon. In our opinion, the complaint contains sufficient allegations to the effect that the defendant union was designated or selected as the exclusive representative of all the employees of the employer, including the plaintiffs, for the purpose of collective bargaining (Labor Law, §705, subd. 1) in entering into a closed shop agreement with the employer."

The above constitutes all of the Court's opinion. We fail to see how counsel for petitioners can adduce all that they write of *Clark* v. *Curtis, supra,* from these cryptic lines.

III.

To state that the petitioners have no remedy under the National Labor Relations Act, as amended, is to draw a curtain on record facts. For the National Labor Relations Board in a series of cases consolidated and tried together (News Syndicate Co., Inc. and Milton Ashkenasy, Case #2-CA-995; News Syndicate Co., Inc. and Edward Canner *et al.*, Case #2-CA-1132; Newspaper and Mail Deliverers' Union of New York and Vicinity and Milton Ashkenasy, Case #2-CB-330; Newspaper and Mail Deliverers' Union of New York and Vicinity and Edward Canner *et al.*, Case #2-CB-373) has found the respondents herein to have violated Sections 8(a)(3) and 8(b)(2) of the

Act with respect to a number of non-union employees of the corporate respondent, including some of the petitioners, and has issued a sweeping order of non-discrimination, reinstatement and back pay.

The Court of Appeals in restricting the petitioners to process before the National Labor Relations Board was cognizant of the fact that the rights of which petitioners claimed to have been deprived were rights created by the Act and that the Act offered not only an ample forum but also the sole forum for the righting of the wrongs alleged on the part of the respondents.

See Sections 8(a)(3) and 8(b)(2), Labor Management Relations Act, 1947 (61 Stat. 136).

Matter of Benedict, 265 App. Div. 518;
Amalgamated Utility Workers v. *Consolidated Edison Co. of N. Y.*, 309 U. S. 261;
Bethlehem Steel Co. v. *N. Y. State Labor Relations Board*, 330 U. S. 767;
Plankington Packing Company v. *Wisconsin Employment Relations Board*, 338 U. S. 953.

POINT II.

No federal question is posed by the Union's membership policy.

Undoubtedly, prior to the amendment of the National Labor Relations Act in 1947, the problem posed by a closed shop contract with an employer coupled with a restrictive membership policy on the part of the bargaining union was one to cause grave concern.

The Labor Management Relations Act, 1947, representing a full scale overhauling of national labor policy, reaffirmed the right of unions to regulate admission of membership; indeed, as the debates on the measure show, Congress anticipated the continuance of restrictive membership policies of one kind or another.

> 2 *Legislative History of the Labor Management Relations Act*, 1947, p. 1096, pp. 1141-1142.

Such restrictive policies were not to be affected since under the Act they could not affect the right of non-members to work, that being protected by Sections 8(a)(3) and 8(b)(2) of the Act.

Petitioners' argument against restrictive membership policies in unions generally is one for the ears of the Legislature and not for the consideration of the Courts.

CONCLUSION.

For all of the foregoing reasons the petition herein should be denied.

Respectfully submitted,

SAMUEL DUKER,
Attorney for Respondent Union.